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CASE NO. _____

In The
SUPREME COURT OF THE UNITED STATES

October Term, 1985

Richard D. LeCount,

Petitioner,

v.

Bethlehem Steel Corporation
and United Steelworkers
of America, Local Union 6787,

Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS, SEVENTH CIRCUIT

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QUESTIONS PRESENTED FOR REVIEW

Whether the United States Court of Appeals for the Seventh Circuit erred in upholding the ruling by the United States District Court for the Northern District of Indiana, Hammond Division, which granted summary judgment in favor of Bethlehem Steel Corporation (hereinafter referred to as "Employer") and United States Steelworkers of America, Local Union 6787 (hereinafter referred to as "Union").

Whether the District Court and Court of Appeals erred in retroactively applying, as a statute of limitations, a period of six (6) months as set forth in 29 U.S.C. §160(b). The Supreme Court of the United States determined in DelCostello v. International Brotherhood of Teamsters, 462 U.S. 151, 103 S.Ct.

2281, 76 L.Ed.2d 476 (1983) that the six month period set forth in 29 U.S.C. §160(b) shall be the applicable statute of limitations in a suit alleging breach of a collective bargaining agreement and breach of the duty of fair representation. DelCostello was decided on June 8, 1983 while the petitioner's lawsuit was filed in the District Court of the Northern District of Indiana, Hammond Division, on June 6, 1979. The question presented for review is whether the District Court and Court of Appeals erred in applying the six month statute of limitations set forth in DelCostello retroactively to bar the petitioner's previously filed claim.

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OPINIONS BELOW

The opinion of the United States Court of Appeals for the Seventh Circuit dated January 3, 1986 is unreported and is set forth in its entirety in Appendix A hereto, infra, pages a-1 through a-12. The January 3, 1985 Order of the United States District Court for the Northern

District of Indiana, Hammond Division, is printed in Appendix C hereto, infra, pages c-1 through c-18.

JURISDICTIONAL STATEMENT

The Order of the Court of Appeals was entered on January 3, 1986. This Petition for Writ of Certiorari is timely filed pursuant to the Rules of the Supreme Court. The jurisdiction of this Court is invoked pursuant to 28 U.S.C. §1254.(1).

STATUTES INVOLVED

The primary federal statute involved herein is known as the National Labor Relations Act, 29 U.S.C. §160(b) which is set forth in its entirety in Appendix B.

Other local statutes of the State of Indiana which apply are I.C. §34-1-2-1:

Limitation of actions--Six-year statute found herein in Appendix B; I.C. §34-1-2-2: Limitation of actions--Two, five, six, ten and twenty years found in Appendix B herein; and I.C. §34-1-2-3: Actions not otherwise limited--Fifteen year statute set forth in Appendix B herein.

STATEMENT OF CASE

FEDERAL COURT JURISDICTION

This action arises out of a complaint filed by petitioner (referred to herein as "Employee") against Employer and Union in the United States District Court, Northern District of Indiana, Hammond Division, on June 6, 1979. The jurisdiction of the United States District Court for the Northern District of Indiana, Hammond Division, was based upon

diversity of citizenship of the parties and that the amount in controversy exceeds the jurisdictional requirement.

Further, Employer was engaged in interstate commerce and was an employer under Sections 501(1)(3) of the Labor Management Relations Act, 29 U.S.C. §142(1)(3) and Section 152(2), as well as Section 301 of said Act (20 U.S.C. §185).

Additionally, Union was at all times a labor organization representing employees in an industry affecting interstate commerce as defined in Sections 501(1)(3) of the Labor Management Relations Act 29 U.S.C. §142(1)(3) and within the meaning of Section 301 of said Act (20 U.S.C. §185).

PROCEDURAL HISTORY OF THE CASE

Employee filed his action on June 6, 1979. On July 16, 1977, Employer filed its Answer, and on June 2, 1982, Union

filed its Answer. Employer filed its Motion for Summary Judgment on March 16, 1981. After various amendments, supplementations, and responses filed by the parties, the Court granted summary judgment in favor of Employer on January 8, 1985. The Court also entered judgment in favor of Union on January 8, 1985. Employee initiated an appeal to the United States Court of Appeals for the Seventh Circuit by filing his Notice of Appeal on February 5, 1985 and his Brief of Appellant on or about April 19, 1985.

MATERIAL FACTS

The facts critical to this case are that Employee commenced his employment with Employer on January 15, 1973. On October 3, 1976, Employee was suspended by Employer for the stated reason of excessive absenteeism with the intent to

discharge. On October 18, 1976, Employee was sent a Notice of Discharge. Employee filed a grievance which proceeded through the first three steps of the grievance procedure. On December 22, 1976, the grievance was settled by the execution of a document entitled Memorandum of Understanding.

On June 6, 1977, Employee was required to leave work due to illness, and returned to work on June 7, 1977. At that time, he had been absent for three additional days from December 22, 1976, the last day being approximately 14 days prior to the end of the term contained in the Memorandum of Understanding. Upon his return to work on June 7, 1977, Employee was informed by Employer that he was suspended with intent to discharge due to the three absences within the six month probationary period in violation of the Memorandum of Understanding.

On June 9, 1977, Employee was discharged by Employer. Employee filed a grievance with Union which grievance went through the first three steps of the grievance procedure. A final determination was made by Mr. James Scott of the International Union that Employee's case would not be submitted to arbitration. On March 10, 1978, the local union decided to withdraw Employee's grievance from the fourth step of the grievance procedure. On June 2, 1978, Employee filed his Complaint with the National Labor Relations Board, which Complaint was denied on September 11, 1978. The Complaint herein was filed on June 6, 1979.

THE LAW OF THE CASE

THE APPLICABLE LAW AS OF JUNE 6, 1979

Employee acknowledges that the instant complaint was filed approximately

nine months after he received notice that Union had withdrawn its consideration of his grievance prior to the fourth step of the grievance procedure. While this is not within the six month limitations period set forth in DelCostello, Employee cannot be held to the DelCostello limitations period for the reason that the applicable statute of limitations in June of 1979 was Indiana's six year statute of limitations applicable to contracts not in writing. I.C. §34-1-2-1. This was determined by the United States Supreme Court in International Union v. Hoosier Cardinal Corporation, 383 U.S. 696, 86 S.Ct. 1107, 16 L.Ed.2d 192 (1966).

In Hoosier Cardinal, the Supreme Court of the United States determined that the statute of limitations applicable to an action brought under the Labor Management Relations Act dealing with suits by and against labor

organizations, was to be determined as a matter of federal law by reference to appropriate state statutes of limitations. In that case, a union was bringing an action against an employer on behalf of an employee. The Court clearly stated that this §301 action was not subject to a statute of limitations specifically set forth in the Act. In fact, in Hoosier Cardinal, the Court was requested to supply a standard statute of limitations to be applicable to these types of claims. The Supreme Court specifically rejected this request:

> Thus, although a uniform limitations provision for §301 suits might well constitute a desirable statutory addition, there is no justification for that drastic sort of judicial legislation that is urged upon us. (Citations omitted.)
>
> That Congress did not provide a uniform limitations provision for §301 suits is not an argument for judicially creating one, unless we ignore the context of this legislative omission. It is clear that

> Congress gave attention to limitations problems in the Labor Management Relations Act, 1947; it enacted a six month's provision to govern unfair labor practice proceedings, 61 Stat. 146, 29 U.S.C. §160(b) (1964 ed.) and it did so only after appreciable controversy. In this context, and against the background of the relationship between Congress and the courts on the question of limitations provisions, it cannot be fairly and inferred that when Congress left §301 without a uniform time limitation, it did so in the expectation that the courts would invent one. Id. at 1111, 1112, and 702, 703.

Thereafter, at the time the instant case was filed, there was no specific statute of limitations in the Labor Management Relations Act, nor was there any case law to suggest that a federal statute of limitations was to be applied on a uniform basis. It is inconceivable that Employee could have been held to anticipate the development of the law as it relates to the applicable statute of limitations and that he could have been

held to that knowledge when the claim was filed in 1979. As late as March 3, 1978, the United States District Court for the Northern District of Illinois held in Canada v. United Parcel Service, Inc., et al., 446 F.Supp. 1048 (1978) that the applicable statute of limitations for an employee to bring an action on the basis of a wrongful discharge by an employer and a failure of a union to observe its duty of fair representation, was a five year period under the five year statute of limitations applicable in the State of Illinois at that time to claims founded upon oral contracts.

It was not until April of 1981 when the United States Supreme Court rendered its opinion in United Parcel Service, Inc. v. Mitchell, 451 U.S. 56, 101 S.Ct. 1559, 67 L.Ed.2d 732 (1981), that parties were, arguably, first placed upon notice that the Supreme Court might ultimately

adopt the six month period provided for in 29 U.S.C. §160(b). However, it was not until DelCostello, which was decided on June 8, 1983, that the Supreme Court of the United States did finally, in fact, adopt said six month period as the applicable statute of limitations. In fact, as late as 1983, the applicability of a local state statute of limitations was upheld in Taylor v. Ford Motor Company, 703 F.2d 738 (C.A.N.J. 1983).

In Dent v. United States Postal Service, 538 F.Supp. 1079 (1982), the United States District Court held that the State of Ohio's six year statute of limitations for breach of contract and not the six month period found in the Labor Management Relations Act would apply to the claim of an employee filing suit against his former employer for wrongful discharge and against his union

for failure to observe its duty of good-faith representation:

> Section 301 of the L.M.R.A., however, contains no limitation period beyond which an action may not be brought, and courts have not been uniform in deciding which limitations period should be supplied. To resolve this problem, Justice Stewart, concurring in United Parcel Service v. Mitchell, 451 U.S. 56, 61, 101 S.Ct. 1559, 1566, 67 L.Ed.2d 732 (1981), . . . recommended the courts should apply the six month limitation period found in section 10(b) of the N.L.R.A. for the filing of unfair labor practice claims. . .
> . . . However, while Justice Stewart's approach is notable, it is not the law. The majority in Mitchell held that "the timeliness of a §301 suit . . . is to be determined as a matter of federal law, by reference to the appropriate state statutes of limitations" Id. 101 S.Ct. at 1652, quoting International Union, UAW v. Hoosier Cardinal Corporation, 383 U.S. 696, 704-05, 86 S.Ct. 1107, 1112-13, 16 L.Ed.2d 192 (1966). Id. at 1082, 1083.

The Court went on to hold that although the plaintiff's action in that

case was based upon the L.M.R.A., the language of Mitchell required a finding that the most appropriate state law applicable would be the State of Ohio's six year statute of limitations for breach of contract. Therefore, any claimant prior to DelCostello could justifiably rely upon the applicable state statute of limitations. Clearly, that can be the only standard to which Employee herein can be held as his Complaint was filed in June of 1979. He was justified in assuming that the applicable statute of limitations to his claims against Union and Employer was at least two years, at the shortest, and 15 years, at the longest, based upon the Indiana statutes of limitations in effect in June of 1979.

As of June, 1979, the various statutes of limitation in Indiana were 10 years for breach of contract in writing

for the payment of money (I.C. §34-1-2-2) and 15 years for other actions not specifically provided for (I.C. §34-1-2-3). The applicable statute of limitations for tort claims in Indiana at the time of the original filing of this complaint was two years for injury to person or property (I.C. §34-1-2-2) and six years for actions brought upon frauds and the breach of contracts in writing (I.C. §34-1-2-1).

RETROACTIVE APPLICATION OF DELCOSTELLO

As more fully set forth in the section below entitled Reasons for Granting the Writ, the United States Supreme Court has yet to rule on the retroactive application of the six month statute of limitations which was adopted in DelCostello. However, a number of cases have been decided in the various Circuit Courts of Appeal arriving at

conflicting conclusions as to the retroactive application of DelCostello under various circumstances.

The District Court herein relied extensively on the Seventh Circuit Court of Appeals decision in Landahl v. P.P.G. Industries, Inc., 746 F.2d 1312 (7th Cir. 1984). The Court failed to recognize that Landahl, as well as many of the decisions rendered in the various circuits on the question of the retroactive application of DelCostello, are factually distinguishable from the instant case. The critical distinguishing factor is that many of the retroactive application cases, including Landahl, have relied upon the notice provided by the Mitchell decision. In Landahl, as in many of these cases, the initial lawsuits were filed after the Mitchell decision and prior to DelCostello. In many of those cases the Courts have held that Mitchell

sufficiently foreshadowed the DelCostello adoption of the six month statute of limitations so as to justify retroactive application.

> Furthermore, the result in DelCostello was foreshadowed, by Mitchell, which was decided only two months after Landahl's grievance was denied. As noted above, the Mitchell majority specifically stated that it was not addressing the issue of whether the six month limitations period in section 10(b) should apply. Id. at 60n.2, 101 S.Ct. at 1562 n. 2. Justice Stewart, in a concurring opinion, urged the Court to adopt that limitations period. Id. at 70-71, 101 S.Ct. at 1567-1568. Justice Blackmun, in a separate concurring opinion, stated that he agreed with Justice Stewart's analysis, but that the Court should not adopt that position until the issue was squarely presented. Id. at 65, 101 S.Ct. at 1565. We believe that these three statements in Mitchell clearly suggested that the limitations period of section 10(b) of the Act would be adopted. Landahl, supra. at 1315.

Clearly, Employee herein did not have the benefit of the Supreme Court's

direction in Mitchell which was available to Landahl and critical to the retroactive application of DelCostello in that, and many of the other cases which have applied DelCostello retroactively.

THE CHEVRON ANALYSIS

Chevron Oil Company v. Huson, 404 U.S. 97, 92 S.Ct. 349, 30 L.Ed.2d 296 (1971) is the landmark decision of the United States Supreme Court stating the applicable standard for review for the retroactive application of a decision altering a state statute of limitations. In order to defeat retroactive application of a case which alters a statute of limitations, it must be shown that:

(1) The case "establishes a new principle of law either by overruling clear past precedent on which litigants may have relied (citations omitted), or by deciding an issue of first impression

whose resolution was not clearly foreshadowed (citations omitted)" Id. at 106, 92 S.Ct. at 355.

(2) The Court must "weigh the merits and demerits in each case by looking into the prior history of the rule in question, its purpose and effect, and whether retroactive application will further or retard its operation." Id.

(3) The Court must determine whether "a decision of this court could produce substantial inequitable results if applied retroactively." Id.

Employee contends that as to the first prong of the Chevron analysis, DelCostello clearly established a new principle of law relative to the applicable statute of limitations. While this change was arguably forseeable by Mitchell, it clearly was not forseeable in June of 1979 when Employee filed his action. The precedent in existence at

that time was clearly the State of Indiana's six year statute of limitations applicable to contracts not in writing as set forth by the United States Supreme Court in Hoosier Cardinal Corporation, supra.

With reference to the second prong of the Chevron analysis, it is difficult to understand how the decision not to apply DelCostello retroactively to Employee's claim herein would in any way serve to frustrate the purpose of DelCostello. While DelCostello stands for the prompt and fair resolution of such claims, Union and Employer in the instant case cannot be heard to argue that allowing Employee's claim to be filed within nine months, as opposed to six months, would seriously jeopardize the goal of prompt and fair resolutions of these claims. This is especially true in view of the fact that after the

original lawsuit was filed on June 6, 1979, Union did not bother to file an answer until June 2, 1982, nearly three years later. Further, this was a full 14 months after Mitchell had been rendered and even then, Union's answer failed to raise the statute of limitations question, despite the language of Mitchell.

Further, it was not until March 16, 1981, nearly two years after the Complaint was filed, that Employer filed its Motion for Summary Judgment. At that time, the Motion did not address the question of the statute of limitations and in fact the issue was not raised by Employer until its Supplemental Memorandum in Support of Its Motion for Summary Judgment was filed on October 5, 1981. In the meantime, Union had had a Default Judgment entered against it and did not move to have the Default Judgment set aside until November 19, 1979. The

Court's Order finally disposing of this matter was not entered until January 8, 1985.

The point is that the interests of Employer and Union in having these claims fairly and promptly resolved were apparently not a concern during the five and one-half years during which this case was pending in the District Court. The issues raised by Employee were first known to Union and Employer in June of 1979. Clearly, Union and Employer have shown no overwhelming desire to have the issues promptly resolved.

Further, the number of cases to which this holding would apply would be minimal if applied only to cases filed prior to Mitchell. Therefore, the determination not to subject a pre-Mitchell case to retroactive application of the six month statute of limitations

would do nothing to inhibit the purpose of the rule.

Employee's position relative to the third prong of the Chevron test is obvious. The "substantial inequitable results" of Chevron are that Employee's claim would be forever barred. Not only is the barring of Employee's claim a substantial result, but it is inequitable for the reason that by no means could Employee in June of 1979 anticipate that the United States Supreme Court would, in 1981, intimate that a different statute of limitations would eventually be adopted and that same would, in fact, ultimately be adopted in 1983. While the case law in the various jurisdictions in effect prior to June of 1979 may have provided for conflicting periods of statutes of limitation, there was no conflict of authority that for a claim brought in the State of Indiana, the

Indiana six year statute of limitations upon contracts not in writing was applicable as per Hoosier Cardinal Corporation. The epitomy of inequity is to change the rules of the game in the final period and then penalize a player who followed the rules which were in effect prior to that time.

EFFECT OF RETROACTIVE APPLICATION IN DELCOSTELLO

The Court of Appeals for the Seventh Circuit also relied heavily in denying Employee's appeal upon the fact that the six month statute of limitations was imposed in the case of DelCostello itself. While several other cases from the various District and Circuit Courts of Appeals have made the same observation, it is clear that the better reasoned decisions recognize that the question of the retroactive application of this new statute of limitations was

not properly presented to the Supreme Court of the United States in DelCostello.

The United States Court of Appeals for the Tenth Circuit presented a cogent analysis of this particular issue in Jones v. Consolidated Freightways Corp., 776 F.2d 1458 (10th Cir. 1985):

> The Supreme Court generally restricts its review to questions fairly presented in the petition for certiorari. Lake Country Estates, Inc. v. Tahoe Regional Planning Agency, 440 U.S. 391, 398, 99 S.Ct. 1171, 1175, 59 L.Ed.2d 401 (1979). Exceptions are well recognized and have been limited thus far to cases involving questions of subject matter jurisdiction, plain error, or significant matters of federal judicial administration. See National Association of Broadcasters v. Federal Communications Commission, 554 F.2d 1118, 1124 n. 15 (D.C.Cir. 1976). Moreover, when the Court has decided a question which was not raised by the parties, "it has invariably done so explicitly." Id. (emphasis in original) (reviewing cases).

> In DelCostello, the issue of retroactivity was not raised in the petitions for certiorari; it was apparently neither briefed nor argued by the parties; and it was not explicitly considered or mentioned by the Court. Therefore, to conclude that the issue has been resolved definitively would be premature. Smith v. General Motors Corp., 747 F.2d 372, 376 (6th Cir. 1984) (en banc) (Merritt, J., concurring specially); accord, Zemonick v. Consolidation Coal Co., 762 F.2d 381 (4th Cir. 1985); cf. United States v. Stewart, 650 F.2d 178, 179-80 (9th Cir. 1981) (retroactivity of search and seizure decision). Id. at 1460.

In addition to the foregoing, the Honorable Justice White of the United States Supreme Court has also recognized that the question of the retroactive application of the DelCostello six month statute of limitations has yet to be determined by the Court. See Greyhound Lines, Inc. v. Wilhite, ___ U.S. ___, 106 S.Ct. ___, 87 L.Ed.2d ___ No. 84-2016 and Saville v. Westinghouse Electric Corp.,

et al., ___ U.S. ___, 106 S.Ct. ___, 87 L.Ed.2d ___ No. 84-2034. Clearly, then, this Court has not squarely considered and determined whether the six month statute of limitations first espoused in DelCostello is to be retroactively applied and, if so, in what cases and under what circumstances retroactive application is appropriate.

REASONS FOR GRANTING THE WRIT

CERTIORARI SHOULD BE GRANTED TO RESOLVE CONFLICTS AMONG THE LOWER COURTS

The various United States Circuit Courts of Appeal have, to varying degrees, had the opportunity to consider this issue. A number of these Circuits have ruled that the DelCostello six month statute of limitations would be applied retroactively to cases filed subsequent to Mitchell. See Graves v. Smith's Transfer Corp., 736 F.2d 819 (1st Cir. 1984), Scott v. Local 683 International

Brotherhood of Teamsters, 725 F.2d 226 (3rd Cir. 1984), Lincoln v. District 9 of the International Association of Machinists and Aerospace Workers and Anheuser Busch, Inc., 723 F.2d 627 (8th Cir. 1983), and Landahl (7th Cir.), supra.

Several other Circuit Courts of Appeal have considered this question and determined that the particular claimant failed to meet one of the three prongs of the Chevron test. See Welyczko v. U.S. Air, Inc. and Thomas Pomeroy, as Chairman of the International Association of Machinists and Aerospace Workers, Local 75, District 471, 733 F.2d 239 (2nd Cir. 1984) where a pre-Mitchell claimant failed to initiate his claim for a period of nearly five years from the date of his discharge. [But, see Byrne v. Buffalo Creek Railroad Company, et al., 765 F.2d 364 (2nd Cir. 1985)]. A majority of cases falling in this class involve

post-Mitchell cases wherein the respective Circuit Courts of Appeal have determined that there was not a clear departure from past law or precedent or that there would not be produced a substantially inequitable result if retroactive application was allowed due to the fact that the cases were filed after Mitchell and before DelCostello. See Perez v. Dana Corporation, Parish Frame Division, 718 F.2d 581 (3rd Cir. 1983), Lincoln, supra, Metz v. Tootsie Roll Industries, Inc., 715 F.2d 299 (7th Cir. 1983), and Smith v. General Motors Corporation, 747 F.2d 372 (6th Cir. 1984).

Still other cases emanating from different Circuit Courts of Appeal have failed to provide a sufficient factual analysis to determine whether the case was pre-Mitchell or post-Mitchell. See Edwards v. Sea-Land Service, Inc., et

al., 720 F.2d 857 (5th Cir. 1983) and Gray v. Amalgamated Meat Cutters, 736 F.2d 1055 (5th Cir. 1980). Other cases have failed to apply Chevron or provide a sufficient analysis under Chevron. See Edwards, supra, Gray, supra, and Rogers v. Lockheed-Georgia Company, 720 F.2d 1247 (11th Cir. 1983).

The United States Court of Appeals for the Second Circuit has had occasion both to affirm and deny retroactive application of DelCostello. In Welyczko v. U.S. Air, Inc., supra, which was decided in 1984, the United States Court of Appeals for the Second Circuit did apply the DelCostello six month statute of limitations retroactively. After confirming its prior retroactive application of DelCostello in Welyczko, the Byrne Court went on to recognize that exceptions to such a rule might exist. By carefully applying a Chevron analysis

to the facts of Byrne, the Court determined that retroactive application would be improper. "In this case, we are persuaded that considerations of equity require us not to apply DelCostello. We think to do otherwise would work a gross injustice . . . ." Id. at 366. Therefore, when presented with an appropriate case vis-a-vis a Chevron analysis, the United States Court of Appeals for the Second Circuit determined that it could not apply DelCostello retroactively in all cases.

In addition to the limited retroactive application of DelCostello in the Second Circuit, there are cases from three other Circuits of the United States Courts of Appeal wherein a retroactive application of the DelCostello six month statute of limitations has been specifically denied.

The 9th Circuit Court of Appeals has been consistent in its position not to apply the DelCostello six month statute of limitations retroactively to cases filed either before or after Mitchell.

The 9th Circuit Court of Appeals in Edwards v. Teamsters Local Union No. 36 Building Material and Dumptruck Drivers, 719 F.2d 1036 (9th Cir. 1983), stated that DelCostello did create a clear departure from past precedent. As to the second Chevron test, the Edwards Court held:

> As to the second criterion, we find that the reasons behind allowing actions against a union for the breach of duty of fair representation would be disserved by barring suit brought by an employee when precedent existing at the time of the filing permitted it. Id. at 1040.

With reference to the third prong of the Chevron test, the Edwards court did not agree that:

> ". . . it would . . . produce the most 'substantial and equitable results' . . . to hold that the respondent 'slept on his rights' at a time when he could not have known the time limitation that the law imposed upon him." Id., citing Chevron at 404 U.S. 108, 92 S.Ct. at 356, L.Ed.2d at 306-307.

The Edwards court held that the plaintiff was unable to anticipate the rule in DelCostello even though his lawsuit was filed eight months after Mitchell. The 9th Circuit has maintained consistency in not applying DelCostello retroactively.

A 9th Circuit case that accurately analyzes the Chevron test vis-a-vis the retroactive application of DelCostello is Barina v. Gulf Trading and Transportation Company, 726 F.2d 560 (9th Cir. 1984). While the Barina Court recognized that the second prong of the Chevron test (whether retroactive application will further or retard the purposes of the rule in question) was not squarely met,

it felt that the first and third factors were overwhelmingly against retroactive application.

> DelCostello establishes a new principle of law because it imposes a limitation on the employee that is eight times shorter than the limitation that applied when his claim arose. Moreover, DelCostello deviated from the Supreme Court's prior direction in UAW V. Hoosier Cardinal Corp., 383 U.S. 696, 704-05, 36 S.Ct. 1107, 1112-13, 16 L.Ed.2d 192 (1966), that the applicable statute of limitations be drawn from state law. See Pitts v. Frito Lay, Inc., 700 F.2d 330, 333 n. 3 (6th Cir. 1983). As for the third factor, "it would . . . produce the most 'substantial inequitable results' to hold that the respondent 'slept on his rights' at a time when he could not have known the time limitation that the law imposed on him." Chevron Oil, 404 U.S. at 108, 92 S.Ct. at 356 (quoting Cipriano v. City of Houma, 395 U.S. 701, 706 89 S.Ct. 1897, 1900, 23 L.Ed.2d 647 (1969). Id. at 563, 564.

For additional 9th Circuit cases refusing to apply DelCostello retroactively, see McNaughton v. Dillingham

Corporation, 722 F.2d 1459 (9th Cir. 1984), Scoggins v. Boeing Co., Inc., 742 F.2d 1225 (9th Cir. 1984), Petersen v. Kennedy, 771 F.2d 1244 (9th Cir. 1985), Rodriguez v. Union Carbide Corp., 735 F.2d 365 (9th Cir. 1984), Aragon v. Federated Department Stores, Inc., 750 F.2d 1447 (9th Cir. 1985) and Glover v. United Grocers, Inc., 746 F.2d 1380 (9th Cir. 1984).

The United States Court of Appeals for the Tenth Circuit considered this question in Jones v. Consolidated Freightways Corporation of Delaware, supra. After determining that the United States Supreme Court had not foreclosed consideration of the retroactive application of DelCostello (see argument above), the Jones Court proceeded to apply the Chevron test to the particular facts of Jones. The Jones Court determined that the law at the time the petitioner filed

his initial claim in July of 1982 was the state statute of Colorado mandating a limitations period of not less than two years. In support of the application of state law on the question of the statute of limitations, the Court cited Hoosier Cardinal Corp., supra. The Jones Court found that United Parcel Service, Inc. v. Mitchell, supra, "did not mandate or otherwise prompt any change in prevailing practice among the Circuits." Jones, supra, at 1462. Then the Jones Court determined that DelCostello did mark a clear break with precedent upon which the petitioner had relied that retroactive application would not further the purposes underlying the DelCostello decision, and that it would be inappropriate to retroactively apply DelCostello to bar the petitioner's claim.

In its most recent consideration of the question of the retroactive

application of DelCostello, the Circuit Court of Appeals for the Fourth Circuit failed to permit retroactive application. In Zemonick v. Consolidation Coal Company, et al., 762 F.2d 381 (4th Cir. 1985), Zemonick's initial action was filed in July of 1981. The Fourth Circuit Court of Appeals found that even though the Mitchell decision preceded this filing by two months, Mitchell did not serve as adequate notice that the controlling authority of Hoosier Cardinal Corporation would be in the future overruled.

> "We simply do not think that the lawyers for the plaintiffs and defendants in this case can be faulted for not having found in the opinions in Mitchell a clear foreshadowing of the decision in DelCostello." Zemonick, supra, at 386.

As the previously applicable state statute of limitations in West Virginia was five years, the Court found the

petitioner's filing sixteen months after his discharge and thirteen months after the last of the arbitration decisions upholding said discharge to be reasonable. The Court further found that the second and third prongs of the Chevron test also favored non-retroactive application of the DelCostello statute of limitations.

The Zemonick Court squarely addressed the issue at hand in its summary:

> In this case in which the equities weigh so strongly against a retroactive application of DelCostello and in which defense counsel as well as plaintiff's counsel saw no problem about timeliness until after DelCostello was decided and this case was ready for disposition on the merits, we think that the Chevron analysis properly leads to a conclusion against retroactive application of DelCostello.
>
> This problem will shortly go away, if it is not already gone, but we think these plaintiffs should have "a satisfactory opportunity" to have their cases decided on the merits, an opportunity which

> the Supreme Court in DelCostello clearly sought to protect. Id. at 389.

Clearly, therefore, there exists among the various Circuits substantial and irreconcilable differences in the retroactive application of DelCostello. Some Districts have determined that any case filed after Mitchell is subject to an automatic retroactive application of DelCostello. Still other Circuits have failed to distinguish between pre-Mitchell and post-Mitchell cases. Other Circuits have failed to adequately consider the issue in terms of the requisite Chevron analysis, while other Circuits have determined not to apply DelCostello retroactively.

It is inherently unfair and inequitable that the opportunity to pursue a right under federal law in the federal courts should depend upon the residency of the claimant due to the inconsistent

application of federal law. As recognized by Mr. Justice White in Greyhound Lines, supra, and Saville, supra, only by establishing a clear definition of the circumstances, if any, under which the DelCostello six month statute of limitations shall be retroactively applied can these inconsistencies be resolved so that equal access to the law is available throughout the land.

THE SEVENTH CIRCUIT COURT OF APPEALS MISAPPLIED THE CHEVRON ANALYSIS TO THE INSTANT CASE

Employee alleges that for the reasons which are set forth more fully above, the United States Circuit Court of Appeals for the Seventh Circuit erred in applying retroactively the DelCostello six month statute of limitations period in the instant case. A proper and thorough application of the Chevron analysis leads to the inescapable

conclusion that retroactive application in this case is inappropriate. The only remedy for this misapplication must come from the United States Supreme Court.

CONCLUSION

For the foregoing reasons, this Petition for Writ of Certiorari should be granted.

Respectfully submitted,

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APPENDIX A

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Order of the United States Court of Appeals for the Seventh Circuit dated January 3, 1986 . . . . . a-1

UNITED STATES COURT OF APPEALS
For the Seventh Circuit
Chicago, Illinois 60604
Submitted* December 17, 1985
January 3, 1986

UNPUBLISHED ORDER
NOT TO BE CITED
PER CIRCUIT RULE 35

Before
HON. HARLINGTON WOOD, JR., Circuit Judge
HON. JOEL M. FLAUM, Circuit Judge
HON. FRANK H. EASTERBROOK, Circuit Judge

RICHARD D. LeCOUNT, Plaintiff-Appellant, No. 85-1186 v. BETHLEHEM STEEL CORPORATION, and UNITED STEEL WORKERS OF AMERICA, LOCAL UNION 6787, Defendants-Appellees.	Appeal from the United States District Court for the Northern District of Indiana, Hammond Division No. 79 C 291 Hon. James T. Moody, Judge

O R D E R

Plaintiff-Appellant, Richard LeCount, appeals from an order of the district court granting Bethlehem Steel's motion for summary judgment and entering summary judgment for the local union on LeCount's suit alleging breach of the collective bargaining agreement, 29 U.S.C. §185 and breach of the duty of fair representation. We affirm the district court's dismissal of LeCount's complaint as barred by the statute of limitations.

I.

LeCount was discharged by his employer, Bethlehem Steel, in October 1976 for "excessive absenteeism". LeCount filed a grievance which was processed through the first three steps of the grievance procedure. A settlement was reached in December 1976, which

provided among other things that LeCount have no more than two absences during the first six months of his reinstatement; a third absence would result in LeCount's dismissal.

Within the six-month period, LeCount was absent for a third time, and as a result, discharged on June 9, 1977. LeCount filed a grievance which was denied at each of the first three steps of the grievance procedure. Pursuant to the collective bargaining agreement, LeCount's grievance was appealed to the International Union. In March 1978, the International Union withdrew the grievance and informed LeCount that it would not be submitted to arbitration. LeCount then filed a complaint with the National Labor Relations Board. The complaint was denied on September 11, 1978.

On June 6, 1979, LeCount filed this action under section 301 of the Labor

Management Relations Act, 29 U.S.C. §185. LeCount alleges that the 1976 settlement and his discharge violate the collective bargaining agreement, and that the Union breached its duty of fair representation by entering into the settlement and by withdrawing his grievance.

The district court decided that the six-month statute of limitations period in section 10(b) of the National Labor Relations Act (NLRA), 29 U.S.C. §160(b), applied to LeCount's claim. On that basis the district court entered summary judgment for the defendants.

II.

In DelCostello v. International Brotherhood of Teamsters, 462 U.S. 151 (1983), the Supreme Court held that the applicable statute of limitations in employment discharge cases involving alleged violations of 29 U.S.C. §185 and a union's alleged breach of the duty of

fair representation, is the six-month period prescribed in §10(b) of the Act, 29 U.S.C. §160(b). LeCount argues that the DelCostello decision should not be applied retroactively to his case. He contends that the three factors set forth in Chevron Oil Co. v. Huson, 404 U.S. 97, 106-07 (1971), used to determine that retroactive application is inappropriate, have been met. In Chevron the Supreme Court held that retroactive application of a case is inappropriate where the decision establishes some new principle of law either by overruling clear past precedent or by deciding an issue of first impression whose resolution was not clearly foreshadowed, retroactive application would retard the purposes and policies behind the decision itself, and retroactive application would produce substantial inequitable results.

LeCount concedes that we have already determined under the Chevron factors that DelCostello should be applied retroactively. Landahl v. PPG Industries, Inc., 746 F.2d 1312 (7th Cir. 1984); See also Metz v. Tootsie Roll Industries, Inc., 715 F.2d 299 (7th Cir. 1983), cert. denied, 464 U.S. 1070 (1984); Ernst v. Indiana Bell Telephone Co., 717 F.2d 1194 (7th Cir. 1983), cert. denied, 464 U.S. 1041 (1984); Storck v. International Brotherhood of Teamsters, 712 F.2d 1194 (7th Cir. 1983). With respect to the first Chevron factor, LeCount attempts to distinguish Landahl because his lawsuit was brought prior to the decision in United Parcel Service, Inc. v. Mitchell, 451 U.S. 56 (1981), which we said in Landahl foreshadowed the DelCostello decision. LeCount argues that the plaintiff in Landahl had the benefit of the Mitchell decision, which

was decided two months after Landahl's grievance was denied; LeCount's grievance, in contrast, was denied over three years prior to the Mitchell decision. Without the benefit of the Supreme Court's direction in Mitchell, LeCosta [sic] concludes that retroactive application in his case would be unfair.

In Landahl we did note that three statements in Mitchell suggested that the limitations period of section 10(b) would be adopted by the Supreme Court. As a result, plaintiffs were not justified in arguing that the DelCostello decision came as a complete surprise. But we also said in Landahl that there was 'no clear past precedent' of the kind contemplated in Chevron. We specifically stated that Mitchell and International Union v. Hoosier Cardinal Co., 383 U.S. 696 (1966), which LeCount relies upon, were not clear precedent. Landahl, 746 F.2d

at 1314. In fact, the law prior to DelCostello was conflicting and confusing both before and after Mitchell. Additionally, this court had already applied the six-month limitation in §10(b) of the National Labor Relations Act six months prior to DelCostello to an employee's claim against a local union for breach of its collective bargaining agreement and breach of its duty of fair representation. Hall v. Printing and Graphic Arts Union, 696 F.2d 494, 498 (7th Cir. 1982), overruled on other grounds, Storck v. Internat'l Brotherhood of Teamsters, 712 F.2d 1194, 1196 (7th Cir. 1983). See also Stevens v. Gateway Transp. Co., 696 F.2d 500, 505 (7th Cir. 1982), cert. denied, 462 U.S. 1132 (1983), overruled on other grounds, Storck v. Internat'l Brotherhood of Teamsters, 712 F.2d 1194, 1196 (7th Cir. 1983). That LeCount did not have benefit of the Mitchell decision

is not a basis for distinguishing Landahl. Indeed, the plaintiff in DelCostello and its companion case United Steelworkers of America v. Flowers both filed suit prior to the Mitchell decision. See also Rogers v. Lockheed-Georgia Co., 720 F.2d 1247, 1250 (11th Cir. 1983), cert. denied, 105 S.Ct. 292 (1984) (DelCostello applied retroactively to six cases; all grievances denied or arbitrator's award decided adversely prior to Mitchell; suits filed pre-Mitchell in two cases).

LeCount also attempts to circumvent the six-month statute of limitations by arguing that his claims are basically intentional tort claims and should therefore be governed by the longer Indiana statute of limitations for fraud or injury to person. This argument is without merit. LeCount clearly filed a hybrid section 301 fair representation

suit. See Erkins v. United Steelworkers of America, 723 F.2d 837, 839 (11th Cir.), cert. denied, 104 S.Ct. 3517 (1984) (presence of "labor law" element plus hybrid nature of suit made application of section 10(b) appropriate in DelCostello). See generally Flores v. Levy Co., 757 F.2d 806, 808-09 (7th Cir. 1985) (argument that DelCostello should be limited to hybrid cases arising out of a "grievance-and-arbitration proceeding" rejected).

In this case, the settlement was reached in December 1976, LeCount was discharged in June 1977, and the union informed LeCount in March 1978 that his grievance would not proceed to arbitration. LeCount did not file his claim until June 1979. The action was filed well over one year from the denial of the grievance and two and one-half years from the first alleged breach of the

collective bargaining agreement. Even assuming (without deciding) that the filing of a complaint with the NLRB may have tolled the limitation period, the very latest LeCount's cause of action might have accrued would have been September 11, 1978, when the NLRB denied his complaint. But LeCount did not file suit until nearly nine months later. Therefore, this suit is untimely.

LeCount also contends that the district court erred in granting summary judgment sua sponte for the union. Macon v. Youngstown Sheet & Tube Co., 698 F.2d 858 (7th Cir. 1983), addresses this issue thoroughly. Like the plaintiff in Macon, LeCount had adequate notice and a fair opportunity to present evidence in opposition to the entry of summary judgment. Id. at 861. Also, the statute of limitations claim raised by Bethlehem Steel in its motion would be equally

effective in barring the claim against the union. Id.; See also Smith v. DeBartoli, 769 F.2d 451, 452 (7th Cir. 1985). The district court properly entered summary judgment for the union.

We have considered all of LeCount's other arguments and find them to be without merit.

AFFIRMED

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* After preliminary examination of the briefs, the court notified the parties that it had tentatively concluded that oral argument would not be helpful to the court in this case. The notice provided that any party might file a "Statement as to Need of Oral Argument." See Rule 34(a), Fed. R. App. P.; Circuit Rule 14(f). No such statement having been filed, the appeal has been submitted on the briefs and record.

APPENDIX B

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National Labor Relations Act,
29 U.S.C. 160(b) b-1

I.C. §34-1-2-1 . . . . . b-3

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I.C. §34-1-2-3 . . . . . b-7

29 U.S.C. §160(b):

Prevention of unfair labor practices--Powers of Board generally

. . . (b) Whenever it is charged that any person has engaged in or is engaging in any such unfair labor practice, the Board or any agent or agency designated by the Board for such purposes, shall have power to issue and cause to be served upon such person a complaint stating the charges in that respect, and containing a notice of hearing before the Board or a member thereof, or before a

designated agent or agency, at a place therein fixed, not less than five days after the serving of said complaint: Provided, that no complaint shall issue based upon any unfair labor practice occurring more than six months prior to the filing of the charge with the Board and the service of a copy thereof upon the person against whom such charge is made, unless the person aggrieved thereby was prevented from filing such charge by reason of service in the armed forces, in which event the six-month period shall be computed from the day of his discharge. Any such complaint may be amended by the member, agent, or agency conducting the hearing or the Board in its discretion at any time prior to the issuance of an order based thereon. The person so complained of shall have the right to file an answer to the original or amended complaint and to appear in person or

otherwise and give testimony at the place and time fixed in the complaint. In the discretion of the member, agent, or agency conducting the hearing or the Board, any other person may be allowed to intervene in the said proceeding and to present testimony. Any such proceeding shall, so far as practicable, be conducted in accordance with the rules of evidence applicable in the district courts of the United States under the rules of civil procedure for the district courts of the United States, adopted by the Supreme Court of the United States pursuant to section 2072 of Title 28. . .

I.C. §34-1-2-1:

Limitation of actions--Six-year statute.

The following actions shall be commenced within six (6) years after the

cause of action has accrued, and not afterwards.

First. On accounts and contracts not in writing.

Second. For use, rents, and profits or real property.

Third. For injuries to property other than personal property, damages for any detention thereof, and for recovering possession of personal property.

Fourth. For relief against frauds. [Acts 1881 (Spec. Sess.), ch. 38, §37, p. 240; 1951, ch. 301, §1, p. 999.]

I.C. §34-1-2-2:

Limitation of actions--Two, five, six, ten and twenty years.

The following actions shall be commenced within the periods herein prescribed after the cause of action has accrued, and not afterwards.

First. For injuries to person or character, for injuries to personal property, and for a forfeiture of penalty given by statute, within two [2] years: Provided, that actions on account of injuries to personal property which occurred prior to the effective date of this amendatory act [March 7, 1951] shall be commenced within two [2] years from the effective date of the amendatory act. . .

Fifth. Upon promissory notes, bills of exchange and other written contracts for the payment of money hereafter executed, within ten [10] years: Provided, That all such contracts as have been heretofore executed may be enforced under this act, within such time only as they have to run, before being barred under the existing law limiting the commencement of actions, and not afterward.

Sixth. Upon contracts in writing other than those for the payment of money within twenty [20] years: Provided, however, That upon all mortgages other than mortgages defined and enumerated by Chapter 147 of the Acts of 1935, and upon deeds of trust, on judgments of courts of record and for the recovery of the possession of real estate, within ten [10] years: Provided, That as to all such mortgages and deeds of trust executed and judgments of courts of record and causes of action for the recovery of the possession of real estate accrued prior to the effective date of this amendatory act [March 7, 1951], the time in which actions shall be commenced thereon shall be the same as if this amendatory act had not become law. [Acts 1881 (Spec. Sess.), ch. 38, §38, p. 240; 1951, ch. 301, §2, p. 999.]

I.C. §34-1-2-3:

Actions not otherwise limited--
Fifteen year statute.

All actions not limited by any other statute shall be brought within fifteen [15] years. In special cases, where a different limitation is prescribed by statute, the provisions of this act shall not apply. [Acts 1881 (Spec. Sess.), ch. 38, §39, p.240.]

APPENDIX C

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Order of the United States District Court, Northern District of Indiana, Hammond Division, dated January 3, 1985 . . . c-1

JUDGMENT IN A CIVIL CASE

UNITED STATES DISTRICT COURT	Northern District of Indiana - Hammond
Case Title RICHARD D. LeCOUNT v. BETHLEHEM STEEL CORPORATION, et al.	Docket Number H 79-291 Name of Judge or Magistrate James T. Moody

( ) Jury Verdict. This action came before the Court and a jury with the judicial officer named above presiding. The issues have been tried and the jury has rendered its verdict.

(XX) Decision by Court. This action came to trial or hearing before the Court with the judge (magistrate) named above presiding. The issues have been tried or heard and a decision has been rendered.

IT IS ORDERED AND ADJUDGED

that defendant Bethlehem Steel Corporation's Motion for Summary Judgment is GRANTED. Judgment is ENTERED for defendant Bethlehem Steel Corporation and against plaintiff.

FURTHER ORDERED that judgment is entered for defendant United Steelworkers of America, Local Union 6787 and against plaintiff.

Clerk	Date
Richard E. Timmons	January 8, 1986

Deputy Clerk
/s/ Audrey Jonsen

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF INDIANA
HAMMOND DIVISION

RICHARD D. LECOUNT, Plaintiff	)	
v.	)	Civil No. H 79-291
BETHLEHEM STEEL CORPORATION and UNITED STEELWORKERS OF AMERICA, LOCAL UNION 6787, Defendants.	)	

O R D E R

This cause is before the Court on a Motion for Summary Judgment which defendant Bethlehem Steel Corporation filed on March 16, 1981. Plaintiff filed a response to the motion on May 17, 1982, and defendant responded thereto on May 24, 1982. However, the various motions and responses filed in regard to summary judgment antedated the Supreme Court's decision in Del Costello v. Teamsters, 76 L.Ed.2d 476 (1983); because Del Costello was concerned with the issue reaised

[sic] in the motion now before this Court, the Court entered an Order on August 31, 1984 directing both parties to brief the effect of Del Costello on the present action. Both parties have complied with that Order; therefore, the issue is now ready for decision.

This action commenced on June 6, 1979 when the plaintiff filed a complaint asserting a cause of action under the Labor-Management Relations Act, 29 U.S.C. §142 et seq. The complaint alleges that both defendants, acting independently and in concert, breached a collective bargaining agreement and the duty of fair representation. Plaintiff seeks damages for the injuries which he alleges that he sustained as a proximate consequence of the defendant's actions.

The complaint arises out of the following facts: Plaintiff entered the employ of defendant Bethlehem Steel

Corporation (hereinafter "the corporation") on January 15, 1973. On October 3, 1976 plaintiff was suspended by the corporation, a suspension entered with the intent to discharge; on October 18, 1976 plaintiff was sent a notice of discharge. The corporation indicated that the reasons for its action was "excessive absenteeism." Plaintiff filed a grievance and defendant United Steelworkers of America Local 6787 (hereinafter, "union") processed the grievance through the first three steps of the grievance procedure.

At this point the corporation and the union reached a settlement; the settlement was submitted to the plaintiff for his approval. Plaintiff signed the settlement, entitled "Memorandum of Understanding", on December 22, 1976. The Memorandum provided, among other things, that the plaintiff was to be on

probation for a period of six months, during which he was to curb his absentee tendencies. Under the Memorandum, plaintiff was subject to immediate discharge upon his third absence during the probationary period.

After returning to work plaintiff was absent from work for three days before his probationary period expired. As a consequence, when he returned to work on June 7, 1977, after the third absence, he was informed that he was suspended with the intent to discharge; the corporation informed the plaintiff that it was taking this step because the plaintiff had violated the terms of the Memorandum of Understanding by which he had been permitted to return to work. Plaintiff was discharged by the corporation on June 9, 1977. Plaintiff filed a grievance with the union, which took the grievance to the fourth step of the

grievance procedure. Plaintiff's grievance was denied at each step.

The union then decided that it would not submit plaintiff's grievance to arbitration, the final step in grievance procedure; plaintiff was informed of this decision on March 10, 1978. After learning of the union's decision, plaintiff filed a complaint against the union with the National Labor Relations Board (hereinafter "NLRB"); this complaint was filed on June 2, 1978. The complaint was denied by the NLRB's regional office; this denial was affirmed by the Office of the chief Counsel in Washington, D.C. on September 11, 1978. Plaintiff then filed this action on June 6, 1979.

Defendant corporation has moved for entry of judgment in its behalf pursuant to Rule 56 of the Federal Rules of Civil Procedure. Defendant asserts that it is entitled to summary judgment because

"(t)he plaintiff's right to maintain this action is extinguished by operation of law." The "operation of law" to which defendant refers is the statute of limitations: Defendant asserts that because the plaintiff failed to initiate this action in a timely fashion, it is barred by the applicable statute of limitations.

Until the Supreme Court's decision in Del Costello v. Teamsters, 76 L.Ed.2d 476 (1983), the statute of limitations applicable to actions for violation of a collective bargaining agreement or for a union's breach of its duty of fair representation was a matter of some uncertainty. See 76 L.Ed.2d at 485-494. The Supreme Court resolved this uncertainty in Del Costello, holding that the statute of limitation applicable to either type of action is the six-months' limitation period provided in §10(b) of

the National Labor Relations Act, 29 U.S.C. §160(b), 76 L.Ed.2d at 482-483. This means that to be timely an action seeking redress for breach of either duty or of both duties, must be filed within six months after accrual; otherwise, it is time-barred. 76 L.Ed.2d at 482, 493-494.

Though Del Costello settled the uncertainty surrounding the applicable statute of limitaitons [sic], it created yet another uncertainty, namely, the application of the rule announced in Del Costello: Was the rule to be applied retroactively, to bar suits commenced prior to the Del Costello decision, or was it only intended to have prospective application?

This is the issue which the Court's Order of August 31, 1984 directed the parties to brief. The Supreme Court has not, as yet, addressed the issue.

However, the circuit courts of appeal have addressed this issue; seven circuits have held that the Del Costello rule is to be applied retroactively. See Gray v. Amalgamated Meat Cutters, Local 40, 736 F.2d 1055 (5th Cir., 1984) Graves v. Smith's Transfer Corp., 736 F.2d 819 (1st Cir., 1984); Scott v. Local 863, International Brotherhood of Teamsters, 725 F.2d 226 (6th Cir., 1984); Murray v. Branch Motor Express Co., 723 F.2d 1146 (4th Cir., 1983); Rudman v. Hensley, No. 83-2384, slip op. (8th Cir., August 13, 1984; Rogers v. Lockheed Georgia Co., 720 F.2d 1247 (11th Cir., 1983); Edwards v. Sea-Land Service, Inc., 720 F.2d 857 (5th Cir., 1983); and Perez v. Dana Corp., Parish Frome [sic] Division, 718 F.2d 581 (3d Cir., .983 [sic]). And both the Seventh and Second Circuits applied the rule retroactively without, however, expressly adopting such a rule. See

Ranieri v. United Transportation Union, No. 83-2563 (7th Cir. Sept. 18, 1984); Assad v. Mt. Sinai Hospital Co., Inc., 725 F.2d 837 (2d Cir., 1984); Ernst v. Indiana Bell Telephone Co., Inc., 717 F.2d 1036 (7th Cir. 1983), cert. denied, ___ U.S. ___, 104 S.Ct. 707 (1984); Metz v. Tootsie Roll Industries, Inc., 715 F.2d 299 (7th Cir. 1983); Storck v. International Brotherhood of Teamsters, 712 F.2d 1194 (7th Cir., 1983).

Recently, however, the Seventh Circuit joined the ranks of those courts of appeal explicitly adopting a rule by which the Del Costello holding must be applied retroactively to bar actions initiated before it was handed down. This is the holding announced in Landahl v. PPG Industries, Inc., No. 84-1158, slip op. (7th Cir., October 23, 1984). In Landahl the Seventh Circuit affirmed a district court's decision dismissing an

action of the type at issue here; the district court dismissed the action as time barred, the action having been instituted "more than fourteen months after [the] grievance was rejected...and more than nine months after plaintiff had received written notification from the Union that it would not further process his grievance." No. 84-1158, slip op. at 2. In affirming the district court's action the Seventh Circuit explicitly announced its adherence to the rule of retroactive application of Del Costello. Id. at 1, 8.

The only issue before this court, then, is whether plaintiff initated [sic] this aciton [sic] within the six-month period established in Del Costello. If he did so, then defendant's motion must be denied; if he did not do so, then the motion must be granted, and judgment entered for the defendant.

The Court finds that plaintiff did not initiate this action in the timely fashion required by Del Costello. This finding is based upon a calculation of all crucial time periods; in making these calculations, the Court has been careful to include every conceivable assumption working in plaintiff's favor. However, even these deliberately biased calculations lead to the inexorable conclusion that this aciton [sic] is time-barred under Del Costello: Plaintiff was discharged from his employment on June 9, 1977. Plaintiff pursued his grievance for that discharge through four unsuccessful steps; on March 10, 1978 the union informed plaintiff that it would not carry his grievance to arbitration.

On June 2, 1978 plaintiff challenged the union's decision by filing a complaint with the NLRB; on September 11, 1978 plaintiff received the final denial

of his NLRB complaint. Plaintiff did not file his complaint in this action until June 6, 1979; plaintiff's complaint was filed, at a minimum, eight months and twenty-four days after the final NLRB action on his challenge to the union's refusal to arbitrate his grievance. The complaint was filed almost two years after plaintiff's discharge from his employment. Even if one employs the shorter period as the basis for the Del Costello calculation, the action is time-barred; in Landahl the Seventh Circuit upheld the dismissal of an action filed nine months after its accrual. Landahl v. PPG Industries, Inc., No. 84-1158, slip op. (7th Cir., October 23, 1984). Landahl controls: This action is time-barred; defendant's motion will be granted, and summary judgment entered in its behalf.

Summary judgment will also be entered on behalf of the remaining, non-moving defendant. The union has not moved for summary judgment; yet plaintiff's claim against the union is based upon the same operative facts. The accrual date for plaintiff's action could be either of two dates: (1) March 10, 1978, which is when the union notified plaintiff that it would not carry his grievance to arbitration; or (2) September 11, 1978, which is the date on which the NLRB finally denied plaintiff's challenge to the union's refusal to process his grievance to arbitration. September 11, 1978 is the date most favorable to plaintiff; however, as the discussion above indicates, the aciton [sic] is time-barred even if one employs September 11, 1978 as the date of accrual for the Del Costello calculation.

It is clear that plaintiff's claim is time barred; it is also clear that the Court may, in this particular circumstance, enter summary judgment on behalf of a non-moving party.

The Seventh Circuit addressed this issue in Macon v. Youngstown Sheet & Tube Co., 698 F.2d 858 (7th Cir., 1983), which involved an action identical to the one now before this Court: Joseph Macon brought an action against his employer and against his labor union, accusing the former of violating the provisions of a collective bargaining agreement and the latter of breaching its duty of fair representaiton [sic]. 698 F.2d at 859. The district court granted summary judgment for both defendants and dismissed the action, despite the fact that only the employer had moved for judgment. Id. at 859-860. Macon appealed and the Seventh Circuit affirmed the trial

court's action. Id. at 860-862. In so doing, the appellate court held that it is permissible to enter judgment on behalf of a non-moving defendant as well as on behalf of a moving defendant; the court based this holding upon the fact that plaintiff had an opportunity to challenge entry of judgment, an opportunity created by the moving defendant's motion. Id. at 861. As the court said, "(b)ecause the appellant did have an opportunity to submit evidentiary material in opposition to the Company's motion and because the district court, in its disposition of the Company's motion, must have determined that there were no issues of material fact and that the plaintiff's claim was barred..., there is no reason why the court could not, on its own motion, grant to the Union the same relief afforded the Company." 698 F.2d at 861, citing Piemonte v. Chicago Board

Options Exchange, Inc., 405 F. Supp. 711, 718 (S.D.N.Y. 1975).

Macon controls; judgment will be entered on behalf of both defendants.

It is, therefore, ORDERED that defendant Bethlehem Steel Corporation's Motion for Summary Judgment be and the same is hereby GRANTED. Judgment is hereby ENTERED for defendant Bethlehem Steel Corporation and against the plaintiff.

It is further ORDERED that, pursuant to Macon v. Youngstown Sheet & Tube Co., 698 F.2d 858 (7th Cir., 1983), judgment is entered for defendant United Steelworkers of America, Local Union 6787 and against the plaintiff.

Clerk to enter judgment accordingly.

ENTER: January 3, 1985

/s/ James T. Moody
JUDGE, UNITED STATES DISTRICT COURT

In The
SUPREME COURT OF THE UNITED STATES
October Term, 1985
No. _____

RICHARD D. LeCOUNT, Petitioner,	)	
v.	)	PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS, SEVENTH CIRCUIT
BETHLEHEM STEEL CORPORATION and UNITED STEELWORKERS OF AMERICA, LOCAL UNION 6787, Respondents.	)	

STATE OF INDIANA)
) SS:
COUNTY OF LAPORTE)

AFFIDAVIT OF SERVICE

I, PATRICK E. DONOGHUE, depose and say that I am Counsel of Record for Petitioner, Richard D. LeCount, herein and that on the 24th day of April, 1986, pursuant to Rule 33, Rules of the Supreme Court, I served one copy of the foregoing Petition for Writ of Certiorari

on each of the parties required to be served herein as follows:

On Respondent, Bethlehem Steel Corporation, the co-Respondent herein, by mailing the copies in a duly addressed envelope with first class postage prepaid, to Larry G. Evans and Karen L. Hughes, Co-Counsel of Record for said Respondent, Bethlehem Steel Corporation, at their office at 103 Lincolnway, P. O. Box 2357, Valparaiso, IN 46383.

On United Steelworkers of America, Local Union 6787, Co-Respondent, by mailing the copies in a duly addressed envelope with first class postage prepaid, to William H. Schmelling, Co-Counsel of Record for said United Steelworkers of America, Local Union 6787, at his office at One East Wacker Drive, Suite 1910, Chicago, IL 60601, and to Carl B. Frankel, Co-Counsel of Record for said United Steelworkers of America,

Local Union 6787, at his office at Five Gateway Center, Pittsburgh, PA 15222.

All parties required to be served have been served.

Patrick E. Donoghue

PATRICK E. DONOGHUE
Counsel of Record for
Petitioner, Richard D.
LeCount

Subscribed and sworn to before me this 24th day of April, 1986.

Shirley J. Chmielowiec

Shirley J. Chmielowiec
Notary Public, Resident of
LaPorte County, Indiana

My commission expires 11/17/89.